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DISCUSSION RESPONSE

## TTIP and the WTO: Anatomy of a murder story and the future of the world trading system

JELENA BÄUMLER — 29 February, 2016



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### A response to Maximilian Oehl

In his thoughtful post, Maximilian Oehl placed TTIP into the wider context of the world trade system and discussed some of the critical questions surrounding the negotiations. While there is certainly no fault in the portrayal of events and facts presented, it may only be one view of the cathedral. Let me add a slightly different one.

### The role of the EU in killing or saving the WTO

In order to explain the Common Commercial Policy of the EU, Maximilian Oehl describes the WTO ‘as having witnessed a crashing decline’ referring to those that even proclaim the ‘occurrence of the death of multilateralism’. Against this backdrop of a stumbling world trade system, the bi- and plurilateralism is on the rise. Major states attempt to conclude an ever increasing number of Preferential Trade Agreements (PTAs) including the so-called mega-regionals, putting the EU under pressure to conclude TTIP in order to have a chance in the competition of systems.

The author describes all those aspects as an automatic sequence, unstoppable and almost like a natural disaster that the EU now has to find answers to. Is the EU really only a passive bystander or what is the role of the EU in all this?

First of all, it should be emphasized that the WTO is not just dying, but is either killed or reanimated by its Members. The deep crisis broke out ever since the Members proclaimed it to be a development round in the Doha Development Agenda. Indeed, unconciliatory positions between the ‘global south’ and the ‘global north’ maneuvered the negotiations and the organization itself into an extremely difficult situation. Yet, Bali as well as Nairobi have shown that the organization is still breathing – although admittedly, to openly ‘agree to disagree’ might not be the best attempt at resuscitation.

WTO Members can revive their organization and it should in fact be their main priority to fight for the global trading system and the most-favoured nation principle instead of joining those that risk dividing the world into trading blocks. Of course this would require that Members, including the EU, begin to compromise even more on sensitive questions

e.g. in the agricultural sector. It is a positive sign and hopefully more than paying lip-service that Cecilia Malmström openly backed the importance of the WTO after Nairobi. However, the suggested inclusion of new topics might prove counterproductive and should be carefully considered.

In this world trading system, the EU is a major player. It includes four of the current G7 states and speaks with a unified voice. Yes, TPP is large and it will probably alter global trade and so might the Regional Comprehensive Economic Partnership (RCEP) among major Asian states. Yet, to what extent we do not know. The EU may feel to be under pressure and give in by also increasingly resorting to bi- and plurilateralism. But it could also withstand and fight for the multilateral approach. It could more actively work in the WTO instead of diverting parts of its resources into negotiations with single countries around the world.

We should not readily accept that multilateralism is dying and academically sleep-walk while one of the most important and well-functioning global institutions is in mortal danger. That makes it even more important to carefully consider how the story is being told. Although the GATT and WTO might be far from perfect, they are still the best we have.

In our WTO murder story, it would be just too easy if the two main suspects would be complicit in the murder, but could successfully point at each other when the corpse is found.

### **The discomfort in combining Trade and Investment**

Maximilian Oehl rightly points out that TTIP and similar treaties mark a new era providing for a new dimension of regulatory depth. TTIP covers almost all aspects of trade, including areas not yet covered by WTO agreements, e.g. regarding rules on competition. There might even be necessity for similar regulatory standards between major trading regions when it comes to common blinker colors. Yet, the real discomfort might neither lie in questions about blinkers nor even in chicken treated with chlorine but in the larger regulatory approaches to be incorporated e.g. with regard to the precautionary principle.

Moreover, for what was not mentioned, is the fact that these comprehensive agreements not only have deep consequences with regard to trade but they diverge from the more conventional approach of keeping trade and investment separate. Despite a vividly debated convergence of trade and investment there might also be a number of good arguments for keeping these two systems – due to their significant systematic differences especially with regard to the role of states and investors in the respective areas – rather separate.

Those that argue against TTIP are often accused of being against ‘free trade’. But maybe the skepticism comes less from further liberating trade but more from a deep insecurity about investment protection and the path this area of international law is taking.

### **Bringing about changes via the public debate**

In my view, the debate is not entirely one of miscommunication from groups within their ‘hermeneutic

circles' leading to an altogether 'redundant dialogue' as argued by Maximilian Oehl.

Sometimes maximum positions are helpful to start a debate and the symbolic Trojan-TTIP-horse in front of the Bundestag certainly had an igniting moment for the public debate in Germany. I take it that without a massive 'Stop-TTIP' campaign we would not see any kind of debate at least not a major one across Europe, including in academic circles. Although the public sometimes appears to make unreasonable arguments out of a more or less well-founded gut-feeling, their negative stance for example on the traditional Investor-State Dispute Settlement (ISDS) system might lead to actual improvements of the system. The reform plans with regard to ISDS and the EU proposal on an Investment Court System (ICS) can be viewed as a direct and regenerative step to constructively react to the criticism.

Of course it puts the EU into a difficult position, having agreed to 'classic' ISDS in CETA before the public protest had started, with the Canadian side now showing only little interest in reopening the negotiations. In the EU-Vietnam agreement the parties are currently implementing a permanent investment dispute resolution with an appellate mechanism reflecting the new approach. There are however some doubts about the ability to successfully negotiate this point with the US in TTIP. But it might just not be the task of the public to comfort their government, but the tasks of governments to find solutions for difficult problems in order to comfort the public.

**A yes or no to TTIP is still an open question**

It may still be about a 'yes' or 'no' because nothing is inevitable. TTIP is a political *choice* and not a reaction to a natural disaster but a decision taken by the leaders in Europe and the US on the background of democratic processes in their respective home countries. Of course the European Commission can always just try to go ahead and do what it thinks is best, hoping for the Council and European Parliament as well as the Member states to follow suit. Yet, we might all remember well what happened with regard to the Anti-Counterfeiting Trade Agreement (ACTA) that was readily agreed to by the Commission but did not pass the European Parliament.

The less the Member States and the European public are taken on board, the less likely the EU Commission can hope for positive reception of the respective agreements. What might be more important from a true *European* democratic point of view, however, is a better understanding about who is in favour and who is against TTIP across Europe and by taking into consideration all stakeholders as otherwise this debate threatens to be treated like a national issue although the Common Commercial Policy is one of the oldest and most important pillars of an integrated Europe.

The importance of the issue justifies a long, sometimes unconstructive and fierce debate to take place. Maybe it is more important than ever to think about the approach of a global competition of systems that is mainly measured by its attractiveness for business critically, instead of expecting from the people to accept the law to be treated as an economic good.

**A response to this post can be found here.**

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